

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

WAYNE SKILES,
Plaintiff,
v.
TESLA, INC., et al.,
Defendants.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. [17-cv-05434-WHO](#)

**ORDER GRANTING DEFENDANTS'
MOTIONS TO DISMISS**

Plaintiff Wayne Skiles files this putative class action against defendants Tesla, Inc. (“Tesla”) and Experian Information Solutions, Inc. (“Experian”), alleging that they violated the Fair Credit Reporting Act (“FCRA”) when Experian provided Tesla with a “Mosaic score” at the time that Skiles visited Tesla’s showroom. Skiles alleges that when he provided Tesla with his driver’s license in order to test drive a car, Tesla sent his personal information to Experian without his consent, and Experian provided a report categorizing him according to likely income, spending habits, and other characteristics. Pursuant to Local Rule 7-1(b), I find this matter suitable for determination without oral argument and VACATE the hearing currently noticed for February 19, 2020. Skiles has failed to adequately allege that the report sent by Experian was a consumer report or that it was not used for a permissible purpose pursuant to the FCRA. However, amendment would not be futile. Accordingly, the defendants’ motions are GRANTED WITH LEAVE TO AMEND.

BACKGROUND

Skiles first filed this action on September 19, 2017 and filed an amended complaint (“FAC”) on December 22, 2017. Dkt. Nos. 1, 61. Skiles alleges that in August of 2015, he visited a Tesla vehicle showroom in Newport Beach, California. Dkt. No. 61 (“FAC”) ¶ 17. A Tesla employee approached him and offered to let him test drive a Tesla car. Skiles stated that he was

1 interested. *Id.* ¶¶ 18-19. The Tesla employee then requested Skiles's driver's license, which
2 Skiles believed was for the purpose of verifying that he was permitted to operate a motor vehicle,
3 but which Tesla in fact used to obtain a report from Experian called a "Mosaic score." *Id.* ¶¶ 20-
4 31. Skiles was not provided an opportunity to consent to this use of his driver's license. *Id.* ¶ 34.
5 Skiles alleges that his Mosaic score was based on his personal information and used by Tesla for
6 sales and marketing purposes and to evaluate his credit worthiness. *Id.* ¶¶ 30-31, 62.

7 Tesla filed a motion to dismiss and to compel arbitration on January 24, 2018. Dkt. No 64.
8 I granted Tesla's motion to compel arbitration and stayed the case. Dkt. No. 76. After the
9 arbitrator found that Skiles's claims were not subject to arbitration, I granted Skiles's request to
10 lift the stay. Dkt. No. 98. The parties subsequently resumed briefing on Tesla's original motion to
11 dismiss the FAC filed in 2017, and Experian re-filed a motion to dismiss on November 27, 2019.
12 Dkt. Nos. 64, 99. In his oppositions, Skiles did not oppose Experian's or Tesla's motions to
13 dismiss his claims under the Electronic Communications Privacy Act and the Driver's Privacy
14 Protection Act, but requests dismissal without prejudice. Dkt. No. 102 at 21; Dkt. No. 103 at 9.

15 **LEGAL STANDARD**

16 Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint
17 if it fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to
18 dismiss, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its
19 face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when
20 the plaintiff pleads facts that "allow[] the court to draw the reasonable inference that the defendant
21 is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). There must be
22 "more than a sheer possibility that a defendant has acted unlawfully." *Id.* While courts do not
23 require "heightened fact pleading of specifics," a plaintiff must allege facts sufficient to "raise a
24 right to relief above the speculative level." *Twombly*, 550 U.S. at 555, 570.

25 In deciding whether the plaintiff has stated a claim upon which relief can be granted, the
26 Court accepts the plaintiff's allegations as true and draws all reasonable inferences in favor of the
27 plaintiff. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, the court is
28 not required to accept as true "allegations that are merely conclusory, unwarranted deductions of

1 fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir.
2 2008) (citation omitted). If the court dismisses the complaint, it “should grant leave to amend
3 even if no request to amend the pleading was made, unless it determines that the pleading could
4 not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th
5 Cir. 2000) (citation omitted). In making this determination, the court should consider factors such
6 as “the presence or absence of undue delay, bad faith, dilatory motive, repeated failure to cure
7 deficiencies by previous amendments, undue prejudice to the opposing party and futility of the
8 proposed amendment.” *Moore v. Kayport Package Express*, 885 F.2d 531, 538 (9th Cir. 1989).

9 DISCUSSION

10 I. REQUESTS FOR JUDICIAL NOTICE

11 Skiles filed a request for judicial notice along with his oppositions requesting notice of
12 publicly available documents from the Federal Trade Commission (“FTC”) and various publicly
13 available documents published by Experian. Dkt. No. 104. I need not rely on the FTC materials
14 because the cases cited by the parties and in this opinion are dispositive of the matters at issue. I
15 have considered the Experian web pages cited in the FAC under the doctrine of incorporation by
16 reference, but the remaining Experian materials have been cited by the parties for their substance
17 and bear on factual matters not appropriate in resolving a motion to dismiss. Skiles’s request is
18 DENIED except as noted.

19 II. FCRA CLAIM

20 A. Whether the Mosaic score is a “consumer report” under the FCRA

21 Tesla and Experian first argue that the Mosaic score is not a “consumer report” as defined
22 by the FCRA because (i) it is not used to establish credit eligibility and (ii) it provides household
23 and not individual consumer data. Dkt. No. 64 at 21; Dkt. No. 99 at 10-12. The FCRA defines
24 “consumer report” as “any written, oral, or other communication of any information by a
25 consumer reporting agency bearing on a consumer’s credit worthiness, credit standing, credit
26 capacity, character, general reputation, personal characteristics, or mode of living,” which is “used
27 or expected to be used or collected in whole or in part for the purpose of serving as a factor in
28 establishing the consumer’s eligibility for -- (A) credit or insurance to be used primarily for

1 personal, family, or household purposes...[or] (C) any other purpose authorized under section
2 1681b of this title.” 15 U.S.C.A. § 1681a(d)(1).

3 The FAC alleges that the Mosaic score is a consumer report because “[i]n generating a
4 ‘Mosaic’ score for Tesla, Experian took into consideration factors bearing on Plaintiff’s credit
5 worthiness, personal characteristics, and mode of living, among other things.” FAC ¶¶ 86-87. It
6 cites Experian’s webpage, which states that Mosaic “is a household-based consumer lifestyle
7 segmentation that empowers marketers with the insights needed to anticipate the behavior,
8 attitudes and preferences of their most profitable customers and reach them in the most effective
9 channels with the best messages.” *Id.* ¶ 87. Listed “key benefits” include “[c]onsumer database of
10 126 million households” and “[p]redictive insights, property characteristics and summarized credit
11 and automotive data.” *Id.*

12 Tesla and Experian argue that Skiles’s allegations with respect to the first aspect of the
13 “consumer report” definition are conclusory. Dkt. No. 64 at 22; Dkt. No. 99 at 11-12. I disagree.
14 Skiles’s citation to Experian’s website provides facts that plausibly support a claim that the
15 Mosaic score contains information relating to “a consumer’s credit worthiness, credit standing,
16 credit capacity, character, general reputation, personal characteristics, or mode of living.” 15
17 U.S.C.A. § 1681a(d)(1).

18 Both Tesla and Experian also argue that the Mosaic score is limited to household data, and
19 not individual data as required by the statute. Dkt. No. 106 at 7; Dkt. No. 107 at 5. While it is
20 true that the FCRA defines a “consumer” as an individual and not a business or group of people,
21 15 U.S.C.A. § 1681a(c), a consumer report need only “bear on” an individual’s creditworthiness
22 or reputation. The household data as pleaded here—which is allegedly prepared for individuals
23 and based upon information from those individuals, *see* FAC ¶ 3, 30—satisfies this standard.
24 Skiles has identified sufficient facts to allege that a Mosaic score “bears on” an individual’s
25 creditworthiness such that it is a consumer report.

26 Skiles asserts that after satisfying the first portion of the definition of “consumer report,”
27 he need only allege that the report could be used in connection with a “business transaction” with
28 a consumer. Dkt. No. 102 at 8-9. However, in citing *Greenway v. Info. Dynamics, Ltd.*, 399 F.

1 Supp. 1092 (D. Ariz. 1974), *aff'd*, 524 F.2d 1145 (9th Cir. 1975), Skiles conflates Section 1681a
2 of the FCRA (concerning definition of “consumer report”) with Section 1681b (concerning
3 permissible use of consumer reports). Section 1681b states that a credit reporting agency may
4 permissibly provide a consumer report to a person that it has reason to believe “has a legitimate
5 business need for the information . . . in connection with a business transaction that is initiated by
6 the consumer.” 15 U.S.C.A. § 1681b(a)(3)(F). Thus, the “business transaction” provision governs
7 whether the Mosaic score was used for a permissible purpose, and not whether it is a consumer
8 report in the first instance.

9 Skiles’s argument that the “business transaction” provision of Section 1681b reads on the
10 definition of “consumer report” by virtue of Section 1681(d)(1)(C) has been rejected by the Ninth
11 Circuit. The court found that requests for consumer reports for the permissible “business
12 transaction” purpose must specifically involve a credit transaction, insurance, employment, or
13 licensing. *Mone v. Dranow*, 945 F.2d 306, 308 (9th Cir. 1991) (“Reports used for ‘business,
14 commercial, or professional purposes’ are not within the purview of the statute”). It rejected
15 Skiles’s broad construction of the “business purpose” provision in Section 1681b because it would
16 render the specificity of Section 1681a meaningless. *Id.* (citing *Houghton v. New Jersey Mfrs. Ins.*
17 *Co.*, 795 F.2d 1144, 1149 (3d Cir. 1986)); *see also Sweet v. LinkedIn Corp.*, No. 5:14-CV-04531-
18 PSG, 2015 WL 1744254, at *9 (N.D. Cal. Apr. 14, 2015) (rejecting position that the “consumer
19 report definition encompasses communications that could be used for the purposes enumerated
20 in Section 1681b(a)”). Accordingly, to plead that the Mosaic score is a “consumer report” under
21 either Section 1681a(d)(1)(A) or 1681a(d)(1)(C), Skiles must allege that it was used or expected to
22 be used in connection with one of the “specifically enumerated transactions” in Section 1681a(d)
23 or Section 1681b(3)(A)-(E), “i.e., credit, insurance eligibility, employment, or licensing.” *Mone*,
24 945 F.2d at 308.

25 Skiles has not adequately alleged this second portion of the definition of “consumer
26 report.” The FAC alleges that Tesla used the Mosaic score at least in part “for the purpose of
27 serving as a factor in establishing Plaintiff’s eligibility for credit to be used to purchase a vehicle
28 for personal use.” FAC ¶ 88. This sparse allegation is somewhat contradicted by the FAC’s

1 repeated claims that Tesla used the Mosaic score to “target Plaintiff for marketing and sales
2 purposes.” *Id.* ¶¶ 3, 31. Although it is possible that Tesla used the Mosaic score for both sales
3 and marketing and credit evaluation purposes, to plead that it is a “consumer report” Skiles must
4 allege facts with respect to *Experian*’s expectations regarding the use of the report when it created
5 the report. As Skiles points out, the Ninth Circuit has held that “[t]he plain language of section
6 1681a(d) reveals that a credit report will be construed as a ‘consumer report’ under the FCRA if
7 the credit bureau providing the information *expects* the user to use the report for a purpose
8 permissible under the FCRA, without regard to the ultimate purpose to which the report
9 is *actually* put.” *Comeaux v. Brown & Williamson Tobacco Co.*, 915 F.2d 1264, 1273–74 (9th
10 Cir. 1990) (emphasis in original). “Thus, if the user of the report led the agency preparing the
11 credit report to believe, either through commission or omission, that the report was to be used for a
12 consumer purpose … the report *is* a consumer report within the meaning of the FCRA.” *Id.* at
13 1274. The FAC contains no information regarding what Experian believed the report would be
14 used for or what Tesla represented to Experian regarding its use of the report. This case is unlike
15 *Greenway*, upon which Skiles relies, because there the “conceded purpose [of the consumer
16 report] [was] to furnish subscribing merchants with information on consumers who may tender
17 checks in payment for purchases so that the subscriber may decide whether or not to accept the
18 check.” 399 F. Supp. at 1095. Accordingly, Skiles failed to adequately plead that the Mosaic
19 score satisfies the second portion of the definition of “consumer report.”

20 **B. Whether the Mosaic score was used for a permissible purpose under the
21 FCRA**

22 Although I need not address the second prong of Skiles’s FCRA claim, I address the
23 parties’ arguments regarding whether Skiles has adequately alleged that Tesla obtained, and
24 Experian furnished, the Mosaic score for a “permissible purpose,” because it relates to the futility
25 of amendment. This analysis differs for each defendant.

26 Section 1681b states that a consumer reporting agency may furnish a consumer report
27 under the FCRA to an entity “which it has reason to believe -- (A) intends to use the information
28 in connection with a credit transaction involving the consumer on whom the information is to be

1 furnished and involving the extension of credit to, or review or collection of an account of, the
2 consumer,” or which “(F) otherwise has a legitimate business need for the information--(i) in
3 connection with a business transaction that is initiated by the consumer . . .” 15 U.S.C.A. §
4 1681b(a)(3). As discussed above, the Ninth Circuit has rejected the argument that Section 1681b
5 permits the provision of a consumer report in connection with any “legitimate business need”
6 unrelated to credit, insurance, employment, or licensing. Accordingly, the Mosaic score could not
7 be furnished for a permissible business purpose of targeting customers for marketing and sales
8 purposes.

9 At the same time, I am not persuaded by Tesla’s arguments that, if Experian expected the
10 Mosaic score to be used or collected at least in part for the purpose of serving as a factor in
11 establishing Skiles’s eligibility for credit, then the Mosaic score was necessarily used in
12 accordance with the FCRA “in connection with a credit transaction . . . and involving the
13 extension of credit,” or in connection with a “legitimate business need” involving credit.
14 Experian’s expectation with respect to the Mosaic score may be different from Tesla’s use
15 (whether intended or actual) of the report. Skiles could plausibly plead that Tesla did not intend to
16 use the Mosaic score for the purposes of extending credit to him, but for an impermissible
17 purpose. Indeed, Skiles has pointed to several cases that demonstrate that where a consumer
18 report was obtained in similar factual circumstances, it was not a permissible use pursuant to
19 Section 1681b absent consumer consent. *Boone v. T-Mobile USA Inc.*, No. 17-cv-378-KM-MAH,
20 2018 WL 588927, at *14 (D.N.J. Jan. 29, 2018) (“a consumer who asks a car dealer to ‘test drive’
21 a car, or asks questions about pricing and financing, ‘is not necessarily indicating an intent to
22 purchase or lease a vehicle from that particular dealer.’”); *Heaton v. Soc. Fin., Inc.*, No. 14-cv-
23 05191-TEH, 2015 WL 6744525, at *4 (N.D. Cal. Nov. 4, 2015) (“credit transaction” purpose
24 applies where plaintiffs evidence intent to have “hard inquiries performed.”); *Traveler v. Glenn
25 Jones Ford Lincoln Mercury 1987*, No. CV-05-0817-PHX-SRB, 2006 WL 173687, at *4 (D. Ariz.
26 Jan. 24, 2006).

27 With respect to Experian, Skiles’s allegations are somewhat in tension with those
28 supporting his assertion that the Mosaic score is a consumer report. As discussed, Skiles has

1 plausibly alleged that the Mosaic score bears on a consumer’s “credit worthiness, credit standing,
2 credit capacity, character, general reputation, personal characteristics, or mode of living,” but has
3 not provided any facts regarding Experian’s expectations in creating and furnishing the report to
4 Tesla. Assuming that Skiles can plausibly allege that Experian expected that Tesla would use the
5 Mosaic score as a factor in establishing the consumer’s eligibility for credit, he cannot
6 simultaneously allege that Experian did not expect that Tesla intended to use that information “in
7 connection with a credit transaction involving the consumer . . . and involving the extension of
8 credit to . . . the consumer.” 15 U.S.C.A. § 1681b(a)(3)(A). As Experian points out, the cases that
9 Skiles cites relate to causes of action against the party requesting the report, not the party
10 furnishing the report.

11 Skiles also states that Experian should have known of Tesla’s allegedly impermissible use
12 based on several “red flags” and that it had a duty to ensure that Tesla had obtained consumer
13 consent before providing any reports. Dkt. No. 102 at 17-19. If properly pleaded, this could
14 possibly be grounds for a plausible claim. However, unlike the case that Skiles relies upon, *Levine*
15 v. *World Fin. Network Nat. Bank*, 437 F.3d 1118, 1121 (11th Cir. 2006), the FAC does not contain
16 any specific facts regarding these red flags. As discussed, there is no information pleaded
17 regarding what Tesla communicated to Experian regarding the Mosaic scores or Experian’s
18 expectations in providing the scores. And Skiles has failed to adequately allege whether and how
19 Experian’s failure to verify consumer consent in these circumstances would violate Section 1681b.

20 Relatedly, Skiles contends that “Experian can be liable for [] Tesla’s impermissible use
21 when [] Experian fails to comply with the statutory obligations imposed by 15 U.S.C. § 1681e.”
22 Dkt. No. 102 at 16. However, he does not allege a violation of this section in the FAC, nor does
23 he provide any facts regarding what effort, if any, Experian made to verify that the uses
24 purportedly certified by Tesla complied with the FCRA. In addition, courts have held that a
25 violation of 1681b is a prerequisite to a claim under Section 1681e. *Abbink v. Experian Info.*
26 *Sols., Inc.*, No. 19-cv-1257-JFW-PJWX, 2019 WL 6838705, at *4 (C.D. Cal. Sept. 20, 2019);
27 *Baker v. Trans Union LLC*, No. 07-cv-8032-PCT-JAT, 2008 WL 4838714, at *5 (D. Ariz. Nov. 6,
28 2008); *Washington v. CSC Credit Servs. Inc.*, 199 F.3d 263, 267 (5th Cir. 2000). Accordingly, in

1 order to state a cause of action against Experian, Skiles must allege additional facts that would
2 demonstrate a theory by which, although the Mosaic score was created with the expectation that
3 Tesla would use it in connection with a credit transaction involving the consumer, Experian
4 violated Section 1681b.

5 Because it is possible that Skiles can plead causes of action against Tesla and Experian, I
6 do not find that amendment would be futile.

7 **C. Whether Skiles has pleaded willful conduct**

8 Skiles has not pleaded actual damages—an element of a claim for a negligent violation of
9 the FCRA—and so has not adequately pleaded his FCRA claim under a negligence theory. *See*
10 *Mnatsakanyan v. Goldsmith & Hull APC*, No. 12-cv-4358 MMM PLAX, 2013 WL 10155707, at
11 *6 (C.D. Cal. May 14, 2013). Instead, Skiles seeks statutory damages, which require that he
12 adequately plead a willful violation of the FCRA. *Id.*; FAC at 16. Willful damages can include
13 knowing or reckless violations of the statute. *Mnatsakanyan*, 2013 WL 10155707, at *7.
14 However, Skiles has not pleaded any facts to support willful damages under either theory, but
15 merely seeks willful damages in his prayer for relief. In his opposition, he suggests in a
16 conclusory manner that because the FTC has deemed use of consumer reports without consent in
17 similar circumstances to be in violation of the FCRA, Experian acted in reckless disregard of the
18 statute. Dkt. No. 102 at 20. But this is not pleaded in the complaint, and without more facts the
19 allegations are insufficient to establish willfulness. Accordingly, Skiles’s allegations with respect
20 to willfulness are inadequate.

21 **III. APPROPRIATE EXPERIAN ENTITY**

22 Experian asserts that Skiles sued the wrong Experian entity, Experian Information
23 Solutions, Inc., because a different entity, Experian Marketing Services, Inc. prepared the Mosaic
24 score. Dkt. No. 99 at 6. Skiles does not fundamentally disagree with this position, but states that
25 Experian inappropriately raised the issue and that it is plausible that Experian Information
26 Solutions, Inc. is a proper defendant. Dkt. No. 102 at 3-4. It appears that Skiles did improperly
27 name Experian Information Solutions, Inc. as defendant. *See* FAC ¶ 87 (citing Experian web page
28 describing “Experian Marketing Services’ Mosaic USA”); *Steinmetz v. Am. Honda Fin.*, No. 19-

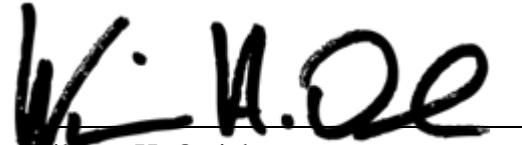
1 cv-64 JCM (VCF), 2019 WL 4415090, at *8 (D. Nev. Sept. 16, 2019) (finding improper Experian
2 entity sued in similar circumstances). If Skiles chooses to file an amended complaint, he may
3 name Experian Marketing Services, Inc. in place of Experian Information Solutions, Inc. as a
4 defendant in light of Experian's representations.

5 **CONCLUSION**

6 For the above reasons, Tesla's and Experian's motions to dismiss the FAC are GRANTED
7 WITHOUT PREJUDICE.¹ Skiles shall file a second amended complaint within twenty days of
8 this order.

9
10 **IT IS SO ORDERED.**

11 Dated: February 19, 2020

12 
13 William H. Orrick
14 United States District Judge

27

28 ¹ Skiles did not oppose Experian's or Tesla's motions to dismiss his claims under the Electronic
Communications Privacy Act and the Driver's Privacy Protection Act but asked leave to amend.
Since amendment is freely given, I will allow it even though it is unclear that he will be able to
successfully amend on those claims.